Chapter 16: "Traditional Waiver" Proceedings

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In this chapter. . .

This chapter discusses the requirements for "traditional waiver" proceedings. In "traditional waiver" proceedings, the prosecuting attorney files a motion asking the Family Division to waive its delinquency jurisdiction over the juvenile. The motion may be filed with or subsequent to the filing of a delinquency petition. The court then conducts a two-phase hearing to determine whether there is probable cause that the juvenile committed a felony, and whether it is in the best interests of the juvenile and public to waive or retain jurisdiction over the juvenile. With the advent of "automatic waiver" and prosecutor-designated case proceedings, which allow prosecuting attorneys to proceed directly to a criminal trial of a juvenile, "traditional waiver" proceedings may be used less frequently. Nonetheless, a prosecuting attorney may utilize the "traditional waiver" proceeding when it desires the assistance of the court in determining

whether to proceed against a juvenile as though he or she were an adult, or where the court must make the waiver decision because a "specified juvenile violation" is not alleged.

For related topics, see the following:

- Comparison of waiver and designated case proceedings, Sections 1.6;
- Detention of juveniles subject to "traditional waiver" proceedings, Section 3.11;
- Table of time and notice requirements, including requirements applicable to "traditional waiver" proceedings, Section 6.12;
- Admissibility of confessions, Section 7.5;
- Ordering a psychiatric or psychological examination of a juvenile, Section 7.7.
- Determining a juvenile's competency, Section 7.8;
- Sentencing, Chapter 23; and
- Appeals, Chapter 24.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and "traditional waiver" proceedings, and to Subchapter 6.900, which govern "automatic waiver" proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook:Delinquency & Criminal Proceedings* (MJI, 1998).

16.1 Due Process Requirements Applicable to "Traditional Waiver" Proceedings

Because the consequences of a decision to waive jurisdiction over a juvenile include imposition of a lengthy prison sentence, a hearing on the motion to waive jurisdiction, access to records and reports, a statement of reasons for the decision on the motion, and the effective assistance of counsel are necessary to satisfy the basic requirements of due process and fairness. *Kent v United States,* 383 US 541, 553–54 (1966). "Full investigation" of the circumstances surrounding the offender and offense is also necessary to satisfy the basic requirements of due process and fairness. *Id.* at 553.

Effective assistance of counsel. A juvenile has a federal constitutional right to be represented by counsel at a waiver hearing. *Kent, supra, People v McGilmer,* 95 Mich App 577, 580 (1980) (application of *Kent* in Michigan), and *In re Gault,* 387 US 1, 41 (1967) (right to notice of the right to counsel and appointment of counsel in appropriate cases). See also *People v Whitfield,* 214 Mich App 348, 353–55 (1995) (juvenile did not receive effective assistance of counsel, where juvenile's attorney failed to appeal the decision to waive jurisdiction over the juvenile).

Voluntariness of a confession. The voluntariness of a juvenile's confession must be established before it may be admitted during the first phase of a waiver hearing. *People v Morris,* 57 Mich App 573, 576 (1975), and *People v Good,* 186 Mich App 180, 185 (1990).*

*See Section 7.5 for discussion of the admissibility of confessions.

Privilege against self-incrimination. In *People v Hana,* 443 Mich 202 (1993), cert den 510 US 1120 (1994), the Michigan Supreme Court addressed the applicability of the Fifth Amendment privilege against self-incrimination to "traditional waiver" proceedings. In *Hana,* the 16-and-a-half-year-old defendant was arrested on drug charges and made incriminating statements to police officers and a youth officer despite receiving and acknowledging that he understood his *Miranda* rights. The defendant's statements were not admitted at the first-phase or "probable cause" hearing; however, the police officers, the youth officer, and a court psychologist who examined defendant testified at the second-phase or "best interests" hearing concerning defendant's incriminating statements. During the second-phase hearing, the court also received testimony from persons who had allegedly purchased illegal drugs from defendant in the past. *Id.* at 205–08. Relying on *In re Gault,* 387 US 1 (1967), the Court of Appeals held that the constitutional protections applicable to criminal trials, including the privilege against self-incrimination, applied to the second-phase of "traditional waiver" proceedings. *Id.* at 209. The Supreme Court reversed and remanded for further proceedings, stating as follows:

> "We conclude that the constitutional protections extended to juvenile proceedings in cases such as *Kent* and *Gault* apply in full force to the adjudicative phase of a juvenile waiver hearing. We also find that the statutes and court rules concerning phase I hearings, when properly applied, afford the appropriate protection. Thus, because none of the alleged confessions or admissions were introduced at the phase I adjudicative phase of the waiver hearing, there was no constitutional violation. We conclude further that the full panoply of constitutional rights asserted by defendant does not apply to the dispositional phase of a waiver hearing. The United States Supreme Court has confined its extension of Fifth and Sixth Amendment rights to the adjudicative and not the dispositional phase of waiver proceedings. Use of defendant's alleged statements to the police and court

> psychologist at the phase II dispositional hearing, therefore, did not violate any constitutional provisions." *Hana, supra* at 225. (Footnotes omitted.)

Hana involved use of a juvenile's confessions or admissions during the second-phase or "best interests" hearing. It appears that a juvenile may assert his or her privilege against self-incrimination *during* the second-phase hearing. Both the state and federal constitutions prohibit compelled self-incrimination. US Const, Am V (no person "shall be compelled in any criminal case to be a witness against himself"), and Const 1963, art 1, § 17 ("[n]o person shall be compelled in any criminal case to be a witness against himself"). See also *Gault, supra* at 55 (privilege against self-incrimination applies to juvenile delinquency proceedings). Despite its reference to criminal proceedings, US Const, Am V, "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *People v Wyngaard,* 462 Mich 659, 671–72 (2000), quoting *Minnesota v Murphy,* 465 US 420, 426 (1984).

Double jeopardy. In *Breed v Jones,* 421 US 519, 531 (1975), the United States Supreme Court held that jeopardy attaches when a juvenile court assumes jurisdiction over a juvenile as a delinquent. Therefore, requiring waiver proceedings to occur before the adjudicatory phase of a delinquency proceeding is constitutionally required and does not diminish the juvenile court's ability to create flexible remedies. *Id.* at 535–41. See also *People v Saxton,* 118 Mich App 681, 688–89 (1982).

16.2 Initiating "Traditional Waiver" Proceedings by Filing a Motion to Waive Jurisdiction

MCL 712A.4(1) sets forth the requirements for initiating a "traditional waiver" proceeding. That provision states as follows:

> "If a juvenile 14 years of age or older is accused of an act that if committed by an adult would be a felony, the judge of the family division of the circuit court in the county in which the offense is alleged to have been committed may waive jurisdiction under this section upon motion of the prosecuting attorney. After waiver, the juvenile may be tried in the court having general criminal jurisdiction of the offense."

*See SCAO Form JC 18.

MCR 3.950(C) sets forth the requirements for the prosecuting attorney's motion.* That court rule states:

> "A motion by the prosecuting attorney requesting that the family division waive its jurisdiction to a court of general criminal jurisdiction must be in writing and must clearly indicate the charges and that if the motion is granted the juvenile will be prosecuted as though an adult."

"Felony" means an offense punishable by imprisonment for more than one year or an offense expressly designated by law as a felony. MCL 712A.4(11) and MCR 3.950(B).

16.3 Waiver Proceedings When Juvenile Is Over 17 Years of Age at Time of Waiver Hearing

MCL 764.27 provides for the transfer of a pending criminal case to the Family Division when it is discovered that the accused is under 17 years of age. If an alleged criminal offense was committed prior to the juvenile's 17th birthday but a complaint is not filed until after the juvenile's 17th birthday, the issue arises as to which court has jurisdiction. MCL 712A.3 addresses that issue by providing that proper jurisdiction is determined by the age of the accused at the time of the offense. That statute states as follows:

> "(1) If during the pendency of a criminal charge against a person in any other court it is ascertained that the person was under the age of 17 at the time of the commission of the offense, the other court shall transfer the case without delay, together with all the papers, documents, and testimony connected with that case, to the family division of the circuit court of the county in which the other court is situated or in which the person resides.
>
> "(2) The court making the transfer shall order the child to be taken promptly to the place of detention designated by the family division of the circuit court or to that court itself or release the juvenile in the custody of some suitable person to appear before the court at a time designated. The court shall hear and dispose of the case in the same manner as if it had been originally instituted in that court."

Thus, if a juvenile is under 17 years of age when the offense is committed but 17 years of age when charged with the offense, the court of general criminal jurisdiction must transfer the case to the Family Division. MCL 712A.5 states that the Family Division "does not have jurisdiction over a juvenile after he or she attains the age of 18 years, except as provided in [MCL 712A.2a]," which governs continuing jurisdiction.* Where the juvenile is under age 17 at the time of the offense but 18 years old or older

*See Section 14.1 for a discussion of continuing jurisdiction over a juvenile.

at the time of being charged, the Court of Appeals has held that the "juvenile court" has jurisdiction for the limited purpose of holding a waiver hearing pursuant to MCL 712A.4. If the Family Division declines to waive its jurisdiction, the case must be dismissed. *People v Schneider,* 119 Mich App 480, 484–87 (1982), and *People v Kincaid,* 136 Mich App 209, 213 (1984).

The Court of Appeals has held that if the prosecuting attorney files a petition in the Family Division and a motion to waive Family Division jurisdiction under MCL 712A.4, that election constitutes a waiver of the alternative option of authorizing a complaint and warrant under the "automatic waiver" statutes. *In re Fultz,* 211 Mich App 299, 311–12 (1995). In *Fultz,* the prosecuting attorney charged Mr. Fultz, then 23 years old, with committing first-degree criminal sexual conduct when he was 16 years old. However, the Michigan Supreme Court ordered that the Court of Appeals' opinion on this "election of forum" issue have no precedential force or effect. *People v Fultz,* 453 Mich 934 (1996).

16.4 Time Requirements for Filing Motions to Waive Jurisdiction

A motion to waive jurisdiction must be filed within 14 days after the petition has been authorized. Absent a timely motion and good cause shown, the juvenile shall no longer be subject to waiver of jurisdiction on the charges. MCR 3.950(C)(1).

16.5 Notice of Hearing and Service of Process

MCL 712A.4(2) states as follows:

> "Before conducting a hearing on the motion to waive jurisdiction, the court shall give notice of the hearing in the manner provided by supreme court rule to the juvenile and the prosecuting attorney and, if addresses are known, to the juvenile's parents or guardians. The notice shall state clearly that a waiver of jurisdiction to a court of general criminal jurisdiction has been requested and that, if granted, the juvenile can be prosecuted for the alleged offense as though he or she were an adult."

Personal service of waiver motion. "A copy of the motion seeking waiver must be personally served on the juvenile and the parent, guardian, or legal custodian of the juvenile, if their addresses or whereabouts are known or can be determined by exercise of due diligence." MCR 3.950(C)(2).

Notice of hearing. MCR 3.950(D) explains that a "traditional waiver" proceeding consists of two phases and provides that "[n]otice of the date, time, and place of the hearings may be given either on the record directly to

the juvenile or to the attorney for the juvenile, the prosecuting attorney, and all other parties, or in writing, served on each individual."

Victim's right to be present during proceedings. MCL 780.789 states:

> "The victim has the right to be present throughout the entire contested adjudicative hearing or waiver hearing of the juvenile, unless the victim is going to be called as a witness. If the victim is going to be called as a witness, the court, for good cause shown, may order the victim to be sequestered until the victim first testifies. The victim shall not be sequestered after he or she first testifies."*

*See Section 9.9 for further discussion of sequestration of victims and witnesses.

16.6 Judge Must Preside Over "Traditional Waiver" Proceedings

MCL 712A.4(1) provides that a judge of the Family Division in the county in which the alleged offense occurred may waive jurisdiction over the juvenile. MCR 3.950(A) states that "[o]nly a judge assigned to hear cases in the family division of circuit court of the county where the offense is alleged to have been committed may waive jurisdiction pursuant to MCL 712A.4." A judge, not a referee, must preside over "traditional waiver" proceedings conducted pursuant to MCR 3.950. MCR 3.912(A)(2).

16.7 Appointment of Attorney

MCL 712A.4(6) states as follows:

> "If legal counsel has not been retained or appointed to represent the juvenile, the court shall advise the juvenile and his or her parents, guardian, custodian, or guardian ad litem of the juvenile's right to representation and appoint legal counsel. If the court appoints legal counsel, the judge may assess the cost of providing legal counsel as costs against the juvenile or those responsible for his or her support, or both, if the persons to be assessed are financially able to comply."

16.8 First-Phase or "Probable Cause" Hearings

MCL 712A.4(3) provides for a "probable cause" hearing in "traditional waiver" proceedings:

> "Before the court waives jurisdiction, the court shall determine on the record if there is probable cause to

> believe that an offense has been committed that if committed by an adult would be a felony and if there is probable cause to believe that the juvenile committed the offense."

See also MCR 3.950(D)(1), which contains substantially similar language.

The determination to be made at a first-phase hearing is analogous to the determination made at the preliminary examination of a criminal proceeding. The court must only find that there is probable cause that the accused committed the charged offense. *People v Burdin,* 171 Mich App 520, 522 (1988). However, juveniles must be afforded the same constitutional protections during first-phase hearings as adults facing a preliminary examination. *People v Hana,* 443 Mich 202, 225, n 62 (1993), and cases cited therein.

Probable cause exists if the facts and circumstances are sufficient to warrant a prudent person in believing that the accused has committed an offense. *Beck v Ohio,* 379 US 89, 91 (1964).

16.9 Waiver of First-Phase or "Probable Cause" Hearings

The court need not conduct a "probable cause" hearing if the juvenile waives the hearing after being informed by the court on the record that the probable cause hearing is equivalent to and held in place of preliminary examination in district court pursuant to MCL 766.1 to 766.18. MCL 712A.4(3). The court must determine that the waiver of hearing is freely, voluntarily, and understandingly given and that the juvenile knows there will be no preliminary examination in district court if the Family Division waives jurisdiction. MCR 3.950(D)(1)(c)(ii).

16.10 Establishment of Probable Cause at a Preliminary Hearing

*See Section 5.12(A).

The court need not conduct the first phase of the waiver hearing if the court has found the requisite probable cause during the pretrial detention determination at a preliminary hearing under MCR 3.935(D)(1), provided that at the earlier hearing only legally admissible evidence was used to establish probable cause that the offense was committed and probable cause that the juvenile committed the offense. MCR 3.950(D)(1)(c)(i).*

MCR 3.903(A)(14) defines "legally admissible evidence" as "evidence admissible under the Michigan Rules of Evidence."

16.11 Time Requirements for First-Phase or "Probable Cause" Hearings

"The probable-cause hearing shall be commenced within 28 days after the filing of the petition unless adjourned for good cause." MCR 3.950(D)(1)(a). The first-phase or "probable cause" hearing must commence within 28 days of the filing, not the authorization, of the petition. *People v Fowler,* 193 Mich App 358, 361 (1992).

In *People v Sweet,* 124 Mich App 626 (1983), the juvenile court found probable cause at a preliminary hearing and ordered the juvenile detained. A hearing was scheduled to occur 30 days after the preliminary hearing. Although the prosecuting attorney filed a motion to waive jurisdiction before that hearing occurred, the hearing date was not changed. On the hearing date, the prosecuting attorney asked for an adjournment because the complainant was physically unable to testify. Finding good cause, the juvenile court granted the adjournment despite the fact that the waiver hearing had not been commenced within 28 days after the filing of the petition. The Court of Appeals found that the rule governing preliminary examinations in criminal cases, which then required dismissal of the complaint and release of the accused for failure to hold a preliminary examination within 12 days of the filing of the complaint, was inapplicable to waiver proceedings where a probable cause determination was made at a preliminary hearing. *Id.* at 628–29. In cases where no probable-cause determination has been made, the Court of Appeals stated that "the nature of the noncompliance [with the 28-day requirement] will dictate the nature of the remedy." *Id.* at 629. The Court did add, however, that "a motion to adjourn must generally be brought within 28 days of the preliminary hearing." *Id.*

If a petition and motion to waive jurisdiction are dismissed for lack of timeliness, the prosecutor may file a second petition, which resets the 14-day time limit in MCR 3.950(C)(1)* for a waiver motion unless the juvenile shows a violation of due process or prosecutorial bad faith. *People v McCoy,* 189 Mich App 201, 203 (1991), citing *People v Weston,* 413 Mich 371, 376 (1982).

*See Section 16.4, above.

16.12 Rules of Evidence at First-Phase or "Probable Cause" Hearings

MCR 3.950(D)(1)(b) states that "the prosecuting attorney has the burden to present legally admissible evidence to establish each element of the offense and to establish probable cause that the juvenile committed the offense." The rules of evidence apply during the first phase of the waiver hearing. *People v Williams*, 111 Mich App 818, 822 (1981).

16.13 Second-Phase or "Best Interests" Hearings

*See Section 16.10, above.

"Upon a showing of probable cause . . . , the court shall conduct a hearing to determine if the best interests of the juvenile and the public would be served by granting a waiver of jurisdiction to the court of general criminal jurisdiction." MCL 712A.4(4). If the court finds the requisite probable cause at the first-phase hearing, or if there was no hearing pursuant to MCR 3.950(D)(1)(c),* the second-phase hearing shall be held to determine whether the interests of the juvenile and the public would best be served by granting the motion for waiver of jurisdiction. MCR 3.950(D)(2).

During the second phase of a waiver hearing, the court cannot accept a plea of admission from a juvenile to a lesser-included offense, thereby assuming jurisdiction over the juvenile as a delinquent, without the concurrence of the prosecutor. The court must allow the prosecuting attorney to present evidence supporting the motion for waiver and determine whether the best interests of the juvenile and public support waiver. *In re Wilson,* 113 Mich App 113, 121 (1982), citing *Genesee Prosecutor v Genesee Circuit Judge,* 386 Mich 672 (1972), and *Genesee Prosecutor v Genesee Circuit Judge,* 391 Mich 115 (1974) (in criminal cases, acceptance of plea to a lesser-included offense over prosecutor's objection violates separation of powers doctrine).

16.14 Special Circumstances Where No Second-Phase Hearing Is Required

MCL 712A.4(5) provides special circumstances where the court may waive its jurisdiction over the juvenile without holding a second-phase or "best interests" hearing. That statutory provision states:

*See Section 2.6 for a discussion of jurisdiction in "automatic waiver" cases.

> "If the court determines that there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony and that the juvenile committed the offense, the court shall waive jurisdiction of the juvenile if the court finds that the juvenile has previously been subject to the jurisdiction of the circuit court under [MCL 712A.4 ('traditional waiver'), MCL 600.606 ('automatic waiver'), or MCL 725.10a ('traditional' or 'automatic waiver' to the former Recorder's Court)]."*

See also MCR 3.950(D)(2), which explicitly states that the court shall not hold a second-phase hearing in such circumstances.

No "juvenile sentencing hearing" following "traditional waiver" proceedings and conviction. After waiver, the juvenile may be tried in the court having general criminal jurisdiction of the offense. MCL 712A.4(1). If convicted in a court of general criminal jurisdiction, the juvenile must be sentenced as an adult, and there will be no "waiver back" or "juvenile sentencing" proceeding. MCR 6.901(B) and *People v Cosby,* 189 Mich App 461, 464 (1991).*

*See Chapter 21 for a discussion of "juvenile sentencing hearings" in "automatic waiver" cases.

In *People v Williams,* 245 Mich App 427, 429–30 (2001), the juvenile was charged with armed robbery and felony firearm. The prosecuting attorney filed a motion to waive jurisdiction. After a first-phase or "probable cause" hearing, the Family Division found probable cause that a felony had been committed and that the juvenile committed it. Because the juvenile previously had been tried for an offense as an adult in circuit court, the Family Division refused to hold a second-phase hearing and waived jurisdiction. Subsequently, the juvenile pled guilty to unarmed robbery in circuit court and was sentenced to imprisonment. The circuit court did not hold a "juvenile sentencing hearing" pursuant to MCL 769.1(3) and MCR 6.931 prior to sentencing the juvenile.

On appeal, the juvenile argued that because the Family Division did not conduct a second phase or "best interests" hearing, he was entitled to a "juvenile sentencing hearing" under MCL 769.1(3) and MCR 6.931. The Court of Appeals disagreed, holding that the plain language of MCR 6.901(B) precludes a "juvenile sentencing hearing" pursuant to MCR 6.931 in all "traditional waiver" proceedings. *Id.* at 433–35. The Court noted that since MCL 712A.4(5) does not require that a juvenile be convicted in the previous proceeding, application of that provision in a subsequent proceeding where an adult sentence is mandatory may lead to unfair results. *Id.* at 437. The Court allowed for the possibility that the Legislature and Michigan Supreme Court intended to preclude a "juvenile sentencing hearing" only where the juvenile previously had been convicted of an offense as an adult, but the Court concluded that the plain language of the relevant statute and court rules did not provide for such a procedure. *Id.* at 438.

In *Williams,* the Court of Appeals explained that a previous panel of that court had stated in dicta that the circuit court retains discretion to impose a "juvenile sentence" following "traditional waiver" proceedings and conviction. See *People v Thenghkam,* 240 Mich App 29, 38–39 (2000). In *Williams,* the Court concluded that the *Thenghkam* dicta was erroneous. See *Williams, supra* at 435–36. The *Thenghkam* dicta also contradicts MCR 6.901(B) and *Cosby, supra.*

16.15 Time Requirements for Second-Phase or "Best Interests" Hearings

*See Section 16.10 (establishment of probable cause at preliminary hearing), above.

The second-phase hearing must commence within 28 days after the conclusion of the first-phase or "probable cause" hearing, or within 35 days after the filing of the petition if there was no first-phase hearing pursuant to MCR 3.950(D)(1)(c),* unless adjourned for good cause. MCR 3.950(D)(2)(a).

16.16 Burden of Proof at Second-Phase or "Best Interests" Hearings

MCL 712A.4(4) is silent on the burden of proof during a second-phase or "best interests" hearing. MCR 3.950(D)(2)(c) states that "[t]he prosecuting attorney has the burden of establishing by a preponderance of the evidence that the best interests of the juvenile and the public would be served by waiver."

16.17 Rules of Evidence at Second-Phase or "Best Interests" Hearings

"The Michigan Rules of Evidence, other than those with respect to privileges, do not apply to the second phase of the waiver hearing." MCR 3.950(D)(2)(b).

Inadmissible evidence, including a juvenile's prior criminal acts not resulting in conviction, may be introduced at the second phase or "best interests" hearing, as long as the evidence is relevant and material and the juvenile has an opportunity to refute the allegations. *People v Williams,* 111 Mich App 818, 822–23 (1981).

16.18 Defense Counsel Access to Records and Reports

MCL 712A.4(7) states as follows:

> "Legal counsel shall have access to records or reports provided and received by the judge as a basis for decision in proceedings for waiver of jurisdiction. A continuance shall be granted at legal counsel's request if any report, information, or recommendation not previously available is introduced or developed at the hearing and the interests of justice require a continuance."

16.19 Criteria to Consider at Second-Phase or "Best Interests" Hearings

MCL 712A.4(4) requires the court "to conduct a hearing to determine if the best interests of the juvenile and the public would be served by granting a waiver of jurisdiction to the court of general criminal jurisdiction." The court must consider and make findings on all of the following criteria, *giving greater weight to the seriousness of the alleged offense and the juvenile's prior delinquency record than to the other criteria. Id.* MCL 712A.4(4)(a)–(f) set forth the following criteria:

> "(a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.
>
> "(b) The culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.
>
> "(c) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.
>
> "(d) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming;
>
> "(e) The adequacy of the punishment or programming available in the juvenile justice system.
>
> "(f) The dispositional options available for the juvenile."

See also MCR 3.950(D)(2)(d)(i)–(vi), which contain the same requirements as MCL 712A.4(4).

The criteria listed above are also used to decide whether to designate the case for criminal trial within the Family Division, to decide whether to impose an adult sentence or juvenile disposition following conviction in designated case proceedings, and to decide whether to impose an adult sentence following conviction of certain "specified juvenile violations" in "automatic waiver" cases. However, in "traditional" waiver cases and in designation hearings in designated case proceedings, the court must consider the best interests of *both* the juvenile and the public; whereas, in

"automatic waiver" cases and at sentencing hearings in designated case proceedings, the court must consider only the best interests of the public.

*See Section 24.8(C) for further discussion of the *Dunbar* case.

MCL 712A.4(4) requires a court to give "greater weight" to the seriousness of the offense and the juvenile's prior delinquency record than to the other criteria listed in that statute. In a case decided under a previous version of this statute, the Michigan Supreme Court held that the seriousness of the offense does not by itself justify waiving jurisdiction over a juvenile. *People v Dunbar,* 423 Mich 380, 387 (1985), citing *People v Schumacher,* 75 Mich App 505, 512 (1977). Because, when *Dunbar* was decided, MCL 712A.4(4) required a court to weigh the applicable criteria "as appropriate to the circumstances," *Dunbar*'s continued validity on this point is uncertain.* See also *In re LeBlanc,* 171 Mich App 405, 412 (1988) (under *Dunbar,* juvenile court judge retained discretion to waive jurisdiction over "an intelligent first-time offender who commits a premeditated murder. . . .").

Although the court must consider the criteria in MCL 712A.4(4) and MCR 3.950(D)(2)(b) when deciding whether to waive jurisdiction over a juvenile, the court "retains the discretion to make the ultimate decision whether to waive jurisdiction over the juvenile." *People v Williams,* 245 Mich App 427, 432 (2001).

The court may consider any stipulation by the defense to a finding that the best interests of the juvenile and the public support waiver. MCR 3.950(D)(2)(e).

16.20 Court Procedures When Waiver Is Ordered

*See Section 16.22, below, for a discussion of the juvenile's right to appeal the order waiving jurisdiction.

MCL 712A.4(8) and MCR 3.950(E)(1)(a), (b), and (d)* provide that if the court determines that it is in the best interests of the juvenile and the public to waive jurisdiction over the juvenile, the court must:

- enter a written order granting the motion to waive jurisdiction and transferring the matter to the appropriate court having general criminal jurisdiction for arraignment of the juvenile on an information;
- make findings of fact and conclusions of law forming the basis for entry of the waiver order. The findings and conclusions may be incorporated in a written opinion or stated on the record; and
- send a copy of the order waiving jurisdiction and the transcript of the court's findings or a copy of the written opinion to the court of general criminal jurisdiction.

MCL 712A.4(4) requires the court to consider and make findings on all of the criteria listed in MCL 712A.4(4)(a)–(f). The court's findings of fact and conclusions of law must refer specifically to evidence of record. *People v*

Dunbar, 423 Mich 380, 388 (1985), citing *People v Schumacher,* 75 Mich App 505, 514 (1977).

In *Spytma v Howes,* __ F3d ___ (CA 6, 2002), the United States Court of Appeals for the Sixth Circuit determined whether due process requires a judge to make specific findings on the record regarding all of the criteria for waiving jurisdiction over a juvenile. Spytma was fifteen years old in 1974 when he was charged with first-degree murder. In waiving jurisdiction over Spytma, the lower court made specific findings regarding some but not all of the applicable waiver criteria. The federal Court of Appeals stated:

> "[O]ur concern today is whether petitioner received due process as required by *Kent* [*v United States*, 383 US 541 (1966)], not whether the state court meticulously complied with Juvenile Rule 11.1. We find that minimum due process requirements were met. Petitioner was represented by counsel and a hearing was held on the record. Whether the Michigan court's waiver of jurisdiction and transfer to adult court contain sufficient indicia under state law is a question for the Michigan courts, which have held that it was valid. Accordingly, despite the lack of specific findings on the record concerning the listed criteria, we cannot say that the judge did not consider all the criteria before making his decision or that the hearing did not comport with minimum due process." *Spytma, supra* at ___.

The Court also indicated that despite the lack of a reviewable record, any error was harmless because any "reasonable" probate judge would have transferred the juvenile to adult court.

16.21 Court Procedures When Waiver Is Denied

If the court does not waive jurisdiction, the court must enter an appropriate order and make written findings of fact and conclusions of law or place them on the record. A transcript of the court's findings or a copy of the written opinion shall be sent to the prosecuting attorney, the juvenile, or the juvenile's attorney upon request. MCL 712A.4(8)–(9) and MCR 3.950(F).*

*See Section 24.9 for a discussion of prosecutorial appeals of an order denying waiver of jurisdiction.

MCL 712A.4(4) requires the court to consider and make findings on all of the criteria listed in MCL 712A.4(4)(a)–(f). The court's findings of fact and conclusions of law must refer specifically to evidence of record. *People v Dunbar,* 423 Mich 380, 388 (1985), citing *People v Schumacher,* 75 Mich App 505, 514 (1977).

MCR 3.950(F) states that "[i]f the juvenile is detained and the trial of the matter in the family division has not started within 28 days after entry of the order denying the waiver motion, and the delay is not attributable to the

defense, the court shall forthwith order the juvenile released pending trial without requiring that bail be posted, unless the juvenile is being detained on another matter."

MCR 3.942(A) provides that all trials in juvenile court must be commenced within six months after the filing of the petition, unless adjourned for good cause.

16.22 Notice of Juvenile's Right to Appeal

If the court waives jurisdiction over the juvenile, the court must advise the juvenile, orally or in writing, that:

> "(i) the juvenile is entitled to appellate review of the decision to waive jurisdiction,
>
> "(ii) the juvenile must seek review of the decision in the Court of Appeals within 21 days of the order to preserve the appeal of right, and
>
> "(iii) if the juvenile is financially unable to retain an attorney, the court will appoint one to represent the juvenile on appeal." MCR 3.950(E)(1)(c)(i)–(iii).

By pleading guilty to an offense in the trial court without seeking review of the decision to waive jurisdiction, a juvenile waives any infirmity in the waiver proceeding. *People v Mahone,* 75 Mich App 407, 410 (1977), and *People v Jackson,* 171 Mich App 191, 195 (1988). Where the juvenile does appeal the decision to waive jurisdiction immediately after waiver, a guilty plea by the juvenile in the trial court does not render a subsequent appeal of the decision to waive jurisdiction moot. *People v Rader,* 169 Mich App 293, 299–300 (1988).

16.23 Transfer to Adult Criminal Justice System

MCR 3.950(E)(2) states that "[u]pon the grant of a waiver motion, a juvenile must be transferred to the adult criminal justice system and is subject to the same procedures used for adult criminal defendants. Juveniles waived pursuant to this rule are not required to be kept separate and apart from adult prisoners."

If the Family Division waives jurisdiction, the juvenile must be arraigned on an information filed by the prosecutor in the court of general criminal jurisdiction. The probable cause finding in the first-phase hearing satisfies the requirements of, and is the equivalent of, the preliminary examination required by the Code of Criminal Procedure. Thus, the juvenile is not entitled to a preliminary examination in district court following "traditional" waiver. MCL 712A.4(10).*

*Prior to a 1996 amendment to MCL 712A.4 that added subsection (10), the juvenile was entitled to a preliminary examination in district court upon demand. See *People v Phillips,* 416 Mich 63, 75 (1982), and *People v Dunigan,* 409 Mich 765, 768–69 (1980).

A juvenile defendant over whom jurisdiction was waived for an offense cannot be charged with a greater offense in the circuit court. *People v Hoerle,* 3 Mich App 693, 698 (1966). However, a guilty plea to an included felony (but not a misdemeanor) other than that with which the defendant was charged is not precluded. *People v Smith,* 35 Mich App 597, 598 (1971). See also *People v Peters,* 397 Mich 360 (1976) (plea to second-degree murder after waiver on charge of first-degree felony murder).

The Holmes Youthful Trainee Act, MCL 762.11 et seq., applies to juveniles over whom jurisdiction has been waived under MCL 764.27. MCL 762.15. MCL 764.27 provides for "traditional waiver" of a juvenile under MCL 712A.4. Application of the Holmes Youthful Trainee Act to "traditionally waived" juveniles is rare, and a discussion of that act is beyond the scope of this benchbook.

16.24 Use of Evidence and Testimony at Criminal Trials

A provision of the Juvenile Code restricts the use of evidence from juvenile delinquency cases in subsequent proceedings. MCL 712A.23 states as follows:

> "Evidence regarding the disposition of a juvenile under [the Juvenile Code] and evidence obtained in a dispositional proceeding under [the Juvenile Code] shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under [the Juvenile Code]. This section does not apply to a criminal conviction under [the Juvenile Code]."

In *People v Hammond,* 27 Mich App 490 (1970), the defendant argued on appeal that the trial court erred by considering physical evidence at trial that had been introduced during a "traditional waiver" proceeding. The Court of Appeals disagreed, holding that MCL 712A.23 did not affect the admissibility at trial of both physical evidence and testimony offered during a "traditional waiver" proceeding:

> "It is our conclusion that the intent of the statute is to proscribe the actual testimony taken at the juvenile proceedings. It is not meant to preclude the physical

> evidence, nor is it meant to exclude a witness who testified at the juvenile proceedings from testifying on the same subject matter at a subsequent trial for the same offense." *Id.* at 494.

See also *People v Pennington,* 113 Mich App 688, 697–98 (1982) (the trial court did not err in allowing the waiver-hearing testimony of an accomplice to be read to the jury, where the accomplice asserted his Fifth Amendment privilege against self-incrimination at trial).

Testimony derived from a court-ordered examination. MCR 3.950(G) states as follows:

> "(1) A psychiatrist, psychologist, or certified social worker who conducts a court-ordered examination for purposes of a waiver hearing may not testify at a subsequent criminal proceeding involving the juvenile without the juvenile's written consent.
>
> "(2) The juvenile's consent may only be given:
>
> > (a) in the presence of an attorney representing the juvenile or, if no attorney represents the juvenile, in the presence of a parent, guardian, or legal custodian;
> >
> > (b) after the juvenile has had an opportunity to read the report of the psychiatrist, psychologist, or certified social worker; and
> >
> > (c) after the waiver decision is rendered.
>
> "(3) Consent to testimony by the psychiatrist, psychologist, or certified social worker does not waive the juvenile's privilege against self-incrimination." MCR 3.950(G)(1)–(3).